

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In re, UNITED STATES OF AMERICA, :
Petitioner, :

----- x

Docket No. 77-30411
77-8271

SOCIALIST WORKERS PARTY, et al., :
Plaintiffs-Appellees, :
-against- :
THE ATTORNEY GENERAL, et al., :
Defendants-Appellants. :

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PLAINTIFFS-APPELLEES' ANSWER
TO PETITION FOR MANDAMUS

Dated: New York, New York
July 18, 1977

RABINOWITZ, BOUDIN & STANDARD
ATTORNEYS AT LAW
30 EAST 42ND STREET
NEW YORK, N.Y. 10017

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77-3041
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ON MANDAMUS AND APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLEES' ANSWER
TO PETITION FOR MANDAMUS

MARY B. PIKE
MARGARET WINTER

Of Counsel.

LEONARD B. BOUDIN
HERBERT JORDAN
Rabinowitz, Boudin & Standard
30 East 42nd Street
(212) 697-8640
Attorneys for Plaintiffs-
Appellees

CONTENTS

	<u>Page</u>
Table of Authorities.....	i-ii
Preliminary Statement.....	1
Reasons for Denying the Writ.....	10
Conclusion.....	32

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Allee v. Medrano, 416 U.S. 802 (1974).....	20
Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).....	27
Brault v. Town of Milton, 527 F.2d 730 (2d Cir.1975)...	27
Camire v. United States, 535 F.2d 749 (2d Cir. 1976)...	30,31
Cherry v. Postmaster General, 332 F.Supp. 785 (S.D.N.Y. 1971).....	20,21
City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).....	30
Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).....	19
Indian Towing Co. v. United States, 350 U.S. 61 (1955).	27
Kerr v. United States District Court, 426 U.S. 394 (1976).....	12
Klein v. Auchincloss, Parker & Redpath, 436 F.2d 339 (2d Cir. 1971).....	30
Lambertson v. United States, 528 F.2d 441 (2d Cir. 1976), cert. denied 426 U.S. 921 (1976).....	27
Marbury v. Madison, 1 Cranch 137 (1803).....	24
Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971).....	12
Myers and Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975).....	27,28
Noto v. United States, 367 U.S. 290 (1961).....	2
Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975).....	27
Riordan v. Ferguson, 2 F.R.D. 349 (S.D.N.Y. 1942).....	19

<u>Cases</u>	<u>Page</u>
Roviaro v. United States, 353 U.S. 53 (1957).....	11,12,13,17
Scales v. United States, 367 U.S. 203 (1961).....	2
Socialist Workers Party v. Attorney General, 510 F.2d 253 (2d Cir. 1974).....	7
Testa v. Katt, 330 U.S. 386 (1947).....	27
Toal v. United States, 438 F.2d 222 (2d Cir. 1971).....	30
United States v. Fernandez, 506 F.2d 1200 (2d Cir.1974).	4,16,17
United States v. National City Bank of New York, 40 F.Supp. 99 (S.D.N.Y. 1941).....	19
United States v. Van Orsdell, 521 F.2d 1323 (2d Cir. 1975), cert. denied 423 U.S. 1059 (1976).....	18
Walling v. Bellikoff, 3 F.R.D. 93 (S.D.N.Y. 1943).....	19
Westinghouse Electric Corp. v. City of Burlington, 351 F.2d 762 (D.C.Cir. 1965).....	13,14
Yates v. United States, 354 U.S. 298 (1957).....	2
<u>Statutes</u>	
28 U.S.C. § 1346(b).....	27
28 U.S.C. § 2401(b).....	30
<u>Other Authorities</u>	
United States Constitution, Article VI.....	27

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PLAINTIFFS-APPELLEES' ANSWER
TO PETITION FOR MANDAMUS

Preliminary Statement

Since this case was last before this court, two central questions have been resolved. First, it has been confirmed through pretrial discovery that, throughout the forty-year "investigation" of the plaintiff organizations, the FBI committed numerous unlawful acts -- many of them crimes such as the more than 95 night-time burglaries of plaintiffs' offices between 1960 and 1976. Moreover, the FBI brought its awesome power to bear in a variety of ways for the purpose of controlling and ultimately destroying the plaintiff organizations, not merely of investigating

them. ^{1/} Also confirmed is the fact that the forty-year investigation -- yielding files of at least 8 million documents -- disclosed only totally lawful political activity on the part of plaintiffs. ^{2/} The latter fact,

1/ This purpose was unabashedly reflected in the title of the Bureau's "Socialist Workers Party Disruption Program", referred to in the petition at p. 9.

The Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, Senate Report No. 94-755, Book II, (Church Committee) concluded that:

In its COINTELPRO operation, the FBI went beyond excessive information-gathering and dissemination to the use of secret tactics designed to "disrupt" and "neutralize" domestic intelligence targets. Final Report at 65.

The FBI's objective was described by William C. Sullivan to the Church Committee in these words:

We were engaged in COINTELPRO tactics, to divide, confuse, weaken, in diverse ways, an organization. We were engaged in that when I entered the Bureau in 1941. Final Report at 66.

2/ It is true that in 1942 SWP leaders were convicted under the advocacy section of the Smith Act, but those sections were later invalidated in Yates v. United States, 354 U.S. 298 (1957), Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961).

Both the House and the Senate committees on surveillance

(cont.)

together with the pressure of this litigation and attendant public criticism, undoubtedly influenced

2/(cont.) concluded that the investigation of the SWP was unjustified:

FBI's failure to uncover illegal activity by this political party is not from lack of effort. SWP has been subjected to 34 years of intensive investigation. . . . FBI officials did not mention the fact that the Socialist Workers are a legitimate American political party, that even runs a candidate for President. Equally as important, the FBI has found no evidence to support a federal prosecution of an SWP member, with the exception of several Smith Act violations in 1941. Since that time, not only have there been no further prosecutions against the SWP for any Federal offense, but the portions of the Smith Act under which those earlier convictions had been obtained have been declared unconstitutional.

The investigation, which FBI officials tacitly admit has been conducted under the aegis of an unprosecutable statute, has revealed that the SWP is a highly law-abiding group. The SWP has even avoided illegal and potentially violent confrontations with the authorities during any sort of civil protest. Nevertheless, this has had no apparent impact on 34 years of unproductive spying. [Excerpts from the suppressed Investigative Report of the Select Committee on Intelligence, United States House of Representatives, 94th Cong., 1st Sess. (1975) (Pike Committee), and reprinted in the Village Voice, February 16, 1976.]

[T]he FBI has admitted that the Socialist Workers Party has committed no criminal acts. Yet the Bureau has investigated the Socialist Workers Party for more than three decades on the basis of its revolutionary rhetoric -- which the FBI concedes falls short of incitement to violence -- and its claimed international links. The Bureau is

(cont.)

the Attorney General's decision in late 1976 to terminate the investigation of plaintiffs -- a decision which came decades too late.

The most pervasive, most insidious, and perhaps most injurious form of FBI operation against plaintiffs was the infiltration of the Socialist Workers Party (SWP) and the Young Socialist Alliance (YSA) by hundreds of paid "informants" -- recently described by this court as "somewhat sleazy individuals." United States v. Fernandez, 506 F.2d 1200, 1204 (2d Cir. 1974).

Plaintiffs allege -- and the scanty evidence obtained so far confirms -- that these informants were not mere passive information reporters. They were offensive weapons, employed to attempt to manipulate, direct, control, divide and destroy the plaintiff organizations, consistent with the policies

2/ (cont.)

currently using its informants to collect information about SWP members' political views, including those on "U.S. involvement in Angola," "food prices," "racial matters," the "Vietnam War," and about their efforts to support non-SWP candidates for political office. [Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, 94th Cong., 2d Session (1976) Book II, page 8 (Church Committee).]

embodied in the FBI's SWP Disruption Program.^{3/} Some ran for public office as electoral candidates of the plaintiff organizations. Others attained leadership positions within the organizations. All participated to some extent in internal debates and decision-making, and the formulation of political policy and programs.^{4/}

In short, for almost the entire period of plaintiffs' existence, their political organizations have been subject to the corrupting influence of a legion of purported members whose real loyalty lay with the FBI.

^{3/} For example, one FBI document says:

LA sources [informants] have been instructed to favor the majority position and to attempt to keep the Swabeck-Liang group from withdrawing from the LAL-SWP [Los Angeles local of the SWP] and where possible, without compromising themselves, to keep the Swabeck-Liang group versus the majority group turmoil at its highest possible peak.

Later on in the same memo, informants are instructed to campaign for election to the local SWP's executive committee so as to be in a better position to engage in "fanning the flames" of this dispute. (App. pp 1320a-1321a, 1324a.)

^{4/} Informers also burglarized plaintiffs' offices and otherwise purloined documents and delivered them to the FBI. Pet., pp. 13a-14.

Although it is difficult to imagine a more profound or insidious interference with fundamental freedoms of speech, association and political activity, there are no authoritative cases in point. Hence this case will require a decision of first impression on the extent to which the First Amendment and other provisions of law impose limitations on the numbers and uses of paid government informants in political organizations. ^{5/}

5/ The Church Committee concluded:

In the absence of regulation through statute, published regulation, or court decision, the FBI has used informants to report on virtually every aspect of a targeted group or individual's activity, including lawful political expression, political meetings, the identities of group members and their associates, the "thoughts and feelings, intentions and ambitions," of members, and personal matters irrelevant to any legitimate governmental interest. Informants have also been used by the FBI to obtain the confidential records and documents of a group.

Informants could be used in any intelligence investigation. FBI directives have not limited informant reporting to actual or likely violence or other violations of law. Nor has any determination been made concerning whether the substantial intrusion represented by informant coverage is justified by the government's interest in obtaining information, or whether less intrusive means would adequately serve the government's interest. There has also been no requirement that the decisions of FBI officials to use informants be reviewed by anyone outside the FBI. In short, intelligence informant coverage has not been subject

(cont.)

As this court said when the case was here before, "Such an issue deserves treatment on a full record and with ample time for reflection, initially by the district judge, later by this court, and perhaps ultimately by higher authority." 510 F.2d at 256. In order even to decide the basic issue of legality, the district court and the reviewing courts must have a comprehensive record which clearly and thoroughly shows the extent of informant infiltration, the kinds of activities engaged in by the informants, how they conducted themselves within the organizations, the degree to which they were instructed and controlled by the FBI, and their effect on the plaintiff organizations.

Judge Griesa has frequently acknowledged that the informant issue is at the very heart of plaintiffs' case, and that the informant files "undoubtedly constitute the most important body of evidence in this case."^{6/}

5/(cont.)

to the standards which govern the use of other intrusive techniques such as electronic surveillance, even though informants can produce a far broader range of information. Final Report at 186.

6/ Transcript of June 8, 1976, at 50; transcript of August 3, 1976, at 17; transcript of May 4, 1976, at 130; transcript of June 22, 1976, at 4; transcript of July 9, 1976, at 50; transcript of May 9, 1977, at 17; transcript of May 31, 1977, at 14-15.

If it is determined that plaintiffs' rights were violated, this same information on the extent and nature of informant infiltration and on their activities will be required to shape equitable relief and to asce^{7/} in damages.

The district court devised the procedure now under attack for the purpose of developing the required record, while protecting the interests asserted by the government. Based upon what we have seen and experienced so far, we are doubtful that the district court's procedure will suffice. We doubt that the required record can be developed by any means other than public disclosure of the identities of at least some of the informants. However, as we have not yet seen the contents or summaries of the 18 files in question, we are in no position to reject the judge's procedure, and therefore we are prepared to submit to it and observe its terms scrupulously. If, as Judge Griesa believes after his exhaustive study of the files, the procedure can result in the development of an adequate trial record with little or no public disclosure of identities, the procedure will have served the

^{7/} See Second Amended Complaint, ¶ A(2), (3), and (4), and ¶B(1) and (2).

interests of all parties and the interests of justice and the public.

Other procedures failed to produce the required facts. The FBI's answers to interrogatories proved unreliable on crucial points, as stated at pp. 13a-14 of the petition. They continued to prove unreliable even after they were reviewed, corrected and certified ^{8/} by supervisory personnel. The seven files which plaintiffs received are grossly inadequate because they pertain to informants in tiny, out-of-the-way branches, and give no indication whatever as to the activities and influence of informants who were long-time members of major urban branches or perhaps of the national staff. Only two of these informants were even members of the SWP. For the same reasons further depositions of the seven known informants

8/ For example, the incident involving "LA sources", p.5. above, and their efforts at "fanning the flames" never appeared in answers to interrogatories, even though the questions clearly called for information about any occasion on which the FBI "instructed or directed the informer as to how to participate in the affairs of the SWP or YSA." Plaintiffs' Interrogatories to FBI (Second Set), interrogatory no. 3.

Further, after the identities of six informants became known to plaintiffs (pet., p. 14), the government admitted that no interrogatory answers at all had been provided for one of them, Jim Nilson.

A more complete discussion of the FBI's failure to provide accurate information about informant activities in response to interrogatories is contained in the affidavits of Syd Stapleton of May 17, 1977, and October 28, 1976. (App. pp. 1308a-1310a, 641a-645a.)

9/
have little promise.

Even more fruitless would be depositions of informants' supervising agents, as suggested at page 91 of the petition. Plaintiffs have attempted to examine several FBI agents on deposition. Two of these refused to answer any questions whatever on Fifth Amendment 10/ grounds. Those who testified refused to answer questions concerning informants on grounds of informant 11/ privilege.

Reasons for Denying the Writ

We agree that this court has jurisdiction. However, the writ should be denied because the informant privilege does not apply to the disclosures ordered by Judge Griesa.

9/ Plaintiffs deposed four of the seven. Three of these testified and one, Redfearn, pleaded the Fifth Amendment. Plaintiffs' resources are limited and we wish to give priority to those depositions most likely to prove fruitful. We have therefore been awaiting a decision on the 18 informant files before determining whether to make the expenditure necessary to depose the last three of the known informants.

10/ Joseph Furrer and Zachary Lowe.

11/ See deposition transcripts of: Raymond Jackson, at 15-16; Arthur J. Greene, Jr., at 76-77; George P. Baxtrum, at 50, 58-60; Donald L. Harmon, at 45; Raymond J. Ruckel, at 52; William C. Sullivan, at 65-66; Robert Shackelford, at 86-87, 90.

Like all principles of law the scope of the privilege is limited by its purpose. That purpose is to encourage the flow of information to law enforcement authorities. Roviaro v. United States, 353 U.S. 53, 59-60 (1957). The privilege does not apply to the disclosure of informant identities under circumstances where the disclosure would not frustrate that purpose. Id. We demonstrate in section I below that the disclosure ordered by Judge Griesa was carefully designed to avoid impairing the flow of information to the authorities, and there is no basis for concluding that any such impairment will occur.

Moreover, the public interest in the flow of information to the authorities is not the only public interest involved in this case. Even more important is the public interest in controlling government excesses in the use of informants -- excesses that endanger the right of political associations to formulate their ideas and carry out lawful political activities free of disruption and manipulation by paid government agents.

Even when a disclosure would tend to frustrate the purpose underlying the privilege, the privilege is relatively weak and does not apply if disclosure

"is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."

Id., 353 U.S. at 60-61. In section II below we demonstrate that Judge Griesa did not abuse his discretion in determining that the disclosure which he ordered is essential to a fair determination of this case.

I.

The privilege does not apply because the disclosures ordered by Judge Griesa will not discourage the flow of information to law enforcement authorities. This is so for two reasons.

First, the judge carefully designed the procedure to ensure that no person, except four attorneys and Mr. Stapleton, will know that any identities have been disclosed. Hence, except for those five individuals, government counsel, and the judges who consider this issue, the judge's procedure will not affect any ^{12/} potential or actual informant.

^{12/} The judge's careful procedure is unlike that in any reported case, including Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971), and Kerr v. United States District Court, 426 U.S. 394 (1976), both cited at pet., p. 49. In neither of these cases did the trial court order concealment of the fact of the disclosure order. The absence of reported cases involving such a procedure

(cont.)

The government offers no substantial argument to the contrary. They intimate that counsel may not be able or willing to observe the protective order, pet., pp. 49-51, but there is no basis for this innuendo and it is contrary to specific findings of the trial judge who has dealt with counsel (and Mr. Stapleton) during this litigation over a period of years.

The second reason why this procedure will not discourage the flow of information is that it constitutes an insignificant inroad on informants' anonymity, which is already quite tenuous under established law and FBI policies.

Any semblance of guaranteed anonymity was put to rest 20 years ago by the Roviaro decision. For a thorough discussion see Westinghouse Electric Corp. v. City of Burlington, 351 F.2d, 762, 767-771 (D.C. Cir. 1965). The court stated:

The Roviaro case stops far short of guaranteeing the anonymity of informers.

...
While the Roviaro balancing test does not

12/(cont.) suggests that, if such an order has ever been entered before, it was not disturbed on appeal. Contrary to the suggestion at pet., p. 52, the procedure is as likely to remain secret if it is ultimately upheld as if it is reversed.

do away with the informer privilege, it significantly weakens it as a reason for excluding relevant evidence and limiting discovery accordingly. 351 F.2d at 769. 13/

Hence there is no basis for the "pledge of confidentiality" referred to in the petition. Further, no such pledge is given. On the contrary, FBI regulations require agents to warn informants that it may become necessary to reveal their identities. 14/

FBI documents produced in this case provide further proof that the "pledge of confidentiality" as described by the government does not exist. When a former FBI informant, who had ceased informing and had become a bona fide SWP member, ran for public office as an SWP candidate, the FBI considered leaking to the public

13/ In the same decision the court rejected the government's argument -- nevertheless renewed here at pet., pp. 47-48 -- that there is significance in the fact that the government can avoid a disclosure order in a criminal case by dropping the charges, while no such option exists in a civil case where the government is not the plaintiff. 351 F.2d at 770, n.13.

14/ The FBI's Manual of Instructions, §107, page 8, provides:

13. Preparation for testifying.
Contacting Agent must condition informant for fact that he may at future day be called upon to testify to information that he has furnished on security matters. Proper indoctrination of informant is essential as Bureau must provide witnesses whenever Department initiates prosecutions in security cases.

the fact that he had been an FBI informant, for the purpose of disrupting the SWP election campaign. 14-A/ The tactic was rejected only on grounds that the FBI might be identified as the source of the information, thereby disclosing that the FBI was engaged in disruption operations. No concern was expressed for the "confidentiality" of the FBI's relationship with its former informant.

In view of the already tenuous anonymity of informants, it borders on the preposterous to argue that they will be discouraged from providing information if the FBI is "compelled to tell them," pet., p.53, that their identities are subject to disclosure to attorneys under protective order if ordered by a federal judge and affirmed by this court and perhaps a higher authority. 15/

Apart from the above, the judge's order is

14-A/ A memo from FBI headquarters to the FBI's New York field office said:

. . . Leroy McRae may possibly be one of the Socialist Workers Party candidates during the forthcoming elections. It was suggested that . . . the fact that he was a former "police spy" could be possibly used in an anonymous mailing phase of this operation. . . . It is noted that McRae was a PSI [informant] of the Philadelphia office. Any Disruption Program operation involving the exposure of McRae as an informant would undoubtedly indicate that the Bureau was the source of this information. Therefore, no further consideration should be given to this possibility. (Memo from Director, FBI, to Special Agent in Charge, N.Y. Gov.Doc. #1173 for prod.)

15/ In any event, society would not crumble if informants were instructed to observe the law in the course of their duties, and were told that failure to do so might result in disclosure of their identities and civil and criminal sanctions.

supported by the recent decision in United States v. Fernandez, 506 F.2d 1200 (2d Cir. 1974). In Fernandez this court ordered the trial court to direct the government to disclose the identities of two informants whose testimony promised to be exculpatory. The court noted that there was "no convincing showing of substantial danger" to the informants if their identities were disclosed, and further noted that the informants "do not provide a continuing source of information to the government." 506 F.2d at 1204-5. Based upon these two factors the court saw "little occasion" to balance any governmental interest against the value to the defense of disclosure. Id. The court then ordered disclosure without any such balancing. In short, the court held that the informants' privilege did not exist under the circumstances.

As the same two factors exist here as in Fernandez, the privilege does not apply and the order below does not violate it. Like Fernandez the government has made "no convincing showing of substantial danger" to informants if the judge's order is implemented. Indeed, the government does not even argue that informants would be endangered if their identities are disclosed to counsel. ^{16/}

^{16/} There has never been any showing -- or serious

(cont.)

Like Fernandez the informants do not provide a continuing source of information now that the investigation has ^{17/} been discontinued.

II.

The district court's order is correct even if the procedure will tend to discourage the flow of information, because the judge accurately determined that the disclosure ordered is "essential to a fair determination of [this] cause." Roviaro v. United States, supra, 353 U.S. at 61. The informant issue is a most serious one, and plaintiffs' claims cannot be fairly tried without access to much more information than has been obtainable through other means. While we are not privy to the materials upon which Judge Griesa based his decision, it is inconceivable that the case could be fairly tried without disclosure of these materials and much more.

16/(cont.) attempt to show -- that these informants would be endangered if their names were made public. On the contrary, plaintiffs have learned the identities of a dozen or more informants over the decades, and not one has suffered anything worse than termination of SWP membership. (App., pp. 657a-659a.)

17/ Director Kelley has specifically ordered the informants not to provide further information concerning plaintiffs.

In this circuit the determination of whether disclosure is essential to a fair trial "is a task best left to the trial court's informed discretion,"^{18/} and we know of no occasion when this court has disturbed a district court's determination. This is a particularly inappropriate case in which to do so, in view of the extraordinary degree to which Judge Griesa informed his discretion by studying huge quantities of documents and by reflecting and deliberating over many months before fashioning his decision.

The government's principal contrary argument is essentially that plaintiffs have no legally sufficient claims to try concerning informants and therefore no further disclosure is needed. Pet., pp. 53-85. This argument is insubstantial, notwithstanding its 32-page bulk.

In the first place, all but the mootness argument were urged upon the district court in support of a motion to dismiss. After extensive briefing and several hearings the court denied the motion on July 29, 1976, thereby ruling that plaintiffs have triable claims. The order denying the motion was and is not appealable, though the

^{18/} United States v. Van Orsdell, 521 F.2d 1323, 1326 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976).

government is in effect attempting to appeal it in this proceeding. This it may not do, as it is settled that discovery may not be denied on the ground that a claim lacks merit, at least unless the claim is patently frivolous. Garland v. Torre, 259 F.2d 545, 551 (2d Cir. 1958), ^{19/}cert. denied, 358 U.S. 910 (1958).

In the second place, the government's arguments concerning the merits are both premature and insubstantial, as well recognized by the district court.

The government first argues that the case is moot insofar as plaintiffs seek equitable relief concerning informants. Pet., pp. 54 ff. This argument is based upon the Attorney General's termination of the SWP investigation in September of 1976, and is devoid of merit.

Neither the Attorney General nor any other government spokesman has represented that the investigation will not be resumed. Nor has there been any representation that, if it is resumed, informants will not be employed,

^{19/} See also Walling v. Bellikoff, 3 F.R.D. 93 (S.D.N.Y. 1943), Riordan v. Ferguson, 2 F.R.D. 349 (S.D.N.Y. 1942), and United States v. National City Bank of New York, 40 F.Supp 99 (S.D.N.Y. 1941).

that their numbers will be limited, or that their activities will be controlled or limited differently from before.

There has been no concession that any aspect of the use of informants in the prior investigation was illegal.

On the other hand, the instant petition makes clear that the government continues to suspect plaintiffs of illegal or unpatriotic activities worthy of investigation, and that the government defends the legality of its use of legions of informants during the fruitless 40-year investigation of plaintiffs.

Under these circumstances it is frivolous to argue that the informant issue is moot. As the Court stated in Allee v. Medrano, 416 U.S. 802, 810-11 (1974):

It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants "would be free to return to [their] old ways." (citations omitted.)

The innuendoes in the government's petition -- often bordering on the scurrilous -- leave no doubt that there is more than "a possibility of recurrence" of the investigation and attendant informant activity.^{20/}

^{20/} The government's reliance on the footnote in Cherry

(cont.)

The government next argues that the disclosure ordered by Judge Griesa is not necessary for development and trial of the informant issue, even if that issue is not moot. Pet., pp. 56 ff. It is difficult for us adequately to defend the judge in this respect, as we are not privy to the materials which he ordered disclosed to us. However, Judge Griesa is highly familiar both with the evidence possessed by plaintiffs and with the content of the disputed informant files. His informed judgment as to the necessity of disclosing the files at least to counsel is therefore entitled to the utmost 21/ deference.

Further, while it is true that plaintiffs possess

20/(cont.) v. Postmaster General, 332 F.Supp. 785, 789 (S.D.N.Y. 1971), pet., p. 55, is misplaced. There, unlike this case, the government made a representation that it would not repeat its past conduct. Further, it is doubtful that the Cherry footnote contains an accurate statement of the law as it existed in 1971, and even more doubtful that such a rule of law would be adhered to or adopted today. The intervening Watergate era has made it impossible to give so much credit to representations of government officials.

21/ It is worth emphasizing that, contrary to the government's frequent intimations (e.g., pet., pp. 57-58), "chilling effect" is a relatively insignificant element of plaintiffs' complaint concerning informants, and hence that is not a subject upon which we anticipate receiving useful discovery from the government.

a substantial amount of information concerning at least a few informants, pet., p.57, it does not follow that this information includes the crucial data needed for fair adjudication of the case. In fact, the FBI has so far withheld the crucial details concerning the scope, extent and impact of informant activity, and, perhaps most important, has refused to disclose the identity or file of even a single long-time informant in an influential position in a major urban branch.

Further, as stated above, pp. 9-10, other methods of obtaining needed information have failed, and the method which has proved least trustworthy of all is the one urged upon us anew by the government, pet., pp.56-57, namely government-prepared statements of our evidence. Even if, contrary to what we and the district court have experienced in this case, government summaries of plaintiffs' evidence could be relied upon for accuracy, plaintiffs should not be required to accept them as a substitute for access to the records and live witnesses. The result of such a procedure would be to permit the defendants in serious litigation to prescribe for the plaintiffs what their evidence will be. 21-A/

21-A/ Moreover, FBI-prepared information about informant activities which would be sufficiently general to conceal informants' identities would lack the details necessary for plaintiffs to connect informants to inexplicable burglaries,

The government argues that the equitable relief sought by plaintiffs is inconsistent with separation of powers. Pet., pp. 58 ff. This argument is but an all-too-familiar attempt by the executive branch to set itself above the rule of law. Since this case was filed the government has admitted to a fruitless 40-year investigation of the plaintiff political organizations, an investigation employing methods such as warrantless burglaries of plaintiffs' premises, warrantless electronic

Footnote continued.

factional disputes and other difficulties which plaintiffs have experienced. For example, the FBI regards even the location of an informant's activity as information which would "tend to reveal" the informant's identity, and therefore such information is invariably deleted from government summaries. It is essential that plaintiffs have access to such details if they are to have anything approaching a fair opportunity to develop the facts. The FBI's informant files often do not disclose key pieces of information, e.g., how the informant obtained plaintiffs' documents; how the informant conducted himself or herself in meetings or factional disputes; or whether he or she routinely exacerbated personal conflicts among members or exploited discussions on political issues to promote conflict and dissension. Plaintiffs, however, if provided with details concerning the times and places where informants obtained documents or participated in plaintiffs' activities, can make connections between the informants' activity and hitherto unexplained factional disputes, burglaries and thefts. This is precisely how plaintiffs learned of informant Redfearn's December 27, 1973 burglary. (App., p. 1306a.)

surveillance, warrantless opening of mail, and an extensive Disruption Program (euphemistically described as a "counterintelligence program"), in addition to the pervasive infiltration by paid informants. There is nothing in separation of powers which deprives the judiciary of the power and the obligation to judge the legality of these acts and to fashion appropriate relief. Marbury v. Madison, 1 Cranch 137 (1803).

Even if there are limitations on the power of the judiciary to supervise investigations, there is surely no barrier to judicial intervention to halt a program aimed at destruction of a political organization carried on in the guise of an "investigation."

The government offers an extensive essay (pet., pp. 59-63) concerning its claimed "valid law enforcement purpose" in carrying on the above activities for 40 fruitless years. We do not understand the relevance of this, except that government counsel apparently desire to prejudice this court by setting forth slanderous characterizations of plaintiffs based upon a biased, selective view of the evidence. In any event, the extent to which the investigation had a valid law enforcement purpose -- as opposed to the disruptive, divisive, destructive purpose reflected in the Disruption Program -- is a question of

fact to be determined below. It cannot possibly be decided on this record.

The government's diffuse discussion of various theories of damage recovery (pet., pp. 63-81) merely emphasizes how inappropriate -- if not impossible -- it is to adjudicate the merits of this complex case on a discovery mandamus. While we do not regard it as worthwhile to respond in extenso to the government's various arguments, as we did on the motion to dismiss below, we comment briefly on them.

As to manipulation and disruption (pet., pp. 65-76), plaintiffs' theories of recovery include prima facie tort, intentional interference with prospective economic relations, the First Amendment, and the analogous provision of the New York State Constitution, Art. I, Sec. 8. The damages so far identified include the loss of members, dues, and fees owing to the divisive, destructive impact of the informant and other FBI operations. They also include the intangible damage sustained by virtue of having an independent political association corrupted by government infiltrators who posed as bona fide members and sought to influence and control political policy and activity, and to sow discord and divide the membership. In addition, there may well

be other forms of injury revealed in the files which Judge Griesa reviewed and ordered disclosed, and in 22/ other informant files.

Plaintiffs are entitled to go to trial on all these theories and the district court correctly so held when denying the motion to dismiss. Insofar as plaintiffs claim loss of members and dues, they complain of "commercial" injuries which would be redressable even under the government's view of prima facie tort and intentional interference with economic relations. Pet., pp. 68-70.

As to the constitutional torts, the government correctly points out that it has never been decided in this circuit whether they are redressable under the Tort Claims Act (pet., p. 68 n.), and certainly this important issue should not be decided by this court

22/ It is not surprising -- and surely no ground for rejecting plaintiffs' claims -- that plaintiffs are unable at this time to describe fully the various injuries which the secret informants caused. Like everyone, plaintiffs have experienced adversities. Unlike almost everyone else, however, it now appears that many of plaintiffs' adversities were caused by the FBI, often through its informants. Plaintiffs are entitled to identify the government-caused injuries, and we agree with the district court's judgment that the facts can only be developed by the disclosure ordered, and more.

23/

on a discovery motion.

The government's argument that any torts involved are exempt under 28 U.S.C. §2680(h) (pet., pp. 73-75) is wholly insubstantial. The terms "misrepresentation" and "deceit" manifestly refer to the established common law forms of action by those names, and are not

23/ The argument as to why the Tort Claims Act covers constitutional torts is simple in summary, although adequate exposition of it would require many pages. The Act makes the government liable for the torts of its employees to the same extent as a private employer "in accordance with the law of the place where the [wrongful] act or omission occurred." 28 U.S.C. §1346(b). The "law of the place" means the "whole law" of the state, including the law of choice of law and conflicts. Lambertson v. United States, 528 F.2d 441, 444 (2d Cir. 1976), cert. denied, 426 U.S. 921 (1976). Here the relevant choice of law rule is the Supremacy Clause, Article VI of the Constitution, under which the law of the First Amendment is binding upon the states, including state courts. Testa v. Katt, 330 U.S. 386, 391 (1947). Hence, the Amendment is part of the law of every state. Authoritative decisions have construed the First Amendment and other constitutional provisions as giving rise to a cause of action for damages consequent upon their violation. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) (Fourth Amendment); Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) (First Amendment); Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975) (due process clause). Contrary to the government's argument (pet., pp. 66-67), it has long been settled that the wrongs which are covered by the Tort Claims Act include wrongs which only government agents can commit. Indian Towing Co. v. United States, 350 U.S. 61 (1955). See also Myers and Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975), where this court held that the Act covers violations of due process and postal regulations by postal employees.

applicable to the facts at bar. Under the government's argument the Tort Claims Act would not cover any torts committed by a government employee who deceived the victim into believing that he was not in fact a government employee.

Equally inapplicable is the exemption for interference with contract rights. Plaintiffs rely not on that tort but on the entirely different tort of interference with prospective business relations. See Myers and Myers v. United States Postal Service, supra, 527 F.2d at 1260; n.8, where this court discussed the differences between the two torts and remanded for trial a claim against the United States based upon interference with the plaintiff's prospective economic advantage.

As to trespass and conversion, even a hasty reading discloses that the government's argument (pet., pp. 76-81) is insubstantial and, indeed, contains its own refutation. First, even accepting the government's statement that "the bulk" of documents obtained by informants were not stolen (pet., p. 77), there remain the other stolen documents which plaintiffs are entitled to find out about and obtain redress for. Of the seven informant files which we have seen, for example, one contains conclusive evidence that the informant Redfearn employed burglary as a means

of obtaining documents on at least two occasions in 1973 and on at least one occasion in 1976. Pet., pp. 13a-14. This incident -- and others like it which may well be disclosed in the 300 files of member informants so far unexplored by plaintiffs -- gives rise to a cause of action in trespass with respect both to the entry of plaintiffs' premises and to the removal of documents.

Second, the government erroneously assumes that plaintiffs have no right of action as to documents which informants possessed by virtue of their "membership" and copied at "the SWP or YSA premises," (pet., pp. 78 ff) for the purpose of giving the copies to the FBI. At a minimum, plaintiffs are entitled to recover the paper and other copying costs which the informants visited upon them while surreptitiously xeroxing documents for the FBI. This claim is by no means trivial, as indications are that the FBI obtained thousands and perhaps millions of pages of copies of plaintiffs' documents over the years.

The government's argument concerning the statute of limitations (pet., pp. 81-85) lacks merit and was properly rejected by the district court as a ground for pretrial dismissal. First, even the government does not argue that claims based upon incidents occurring after October, 1974

are time barred. Second, the argument as to earlier incidents lacks merit. Again, owing to the inappropriateness of this proceeding as a mode of reviewing a denial of a motion to dismiss, we merely summarize the argument.

Under settled decisions a claim does not "accrue" within the meaning of 28 U.S.C. §2401(b), until the victim knew or reasonably should have known of the existence of the cause of action. See, e.g., City of Detroit v. Grinnell Corp., 495 F.2d 448, 460-61 (2d Cir. 1974); Toal v. United States, 438 F.2d 222, 224-225 (2d Cir. 1971).

The question of when plaintiffs knew or reasonably should have known of the existence of their causes of action is a question of fact. Camire v. United States, 535 F.2d 749, 751 (2d Cir. 1976). This question must be resolved on the basis of evidence, like any such question. If disputed, it may not be decided on a motion for summary judgment. Camire v. United States, supra; Klein v. Auchincloss, Parker & Redpath, 436 F.2d 339 (2d Cir. 1971). Even more clearly it cannot be decided on a discovery motion.

In this case plaintiffs submitted affidavits

to show that they neither knew nor reasonably could have known of the manipulative or disruptive use of informants prior to December, 1974. (App., pp.513a,516a) The factual assertions in these affidavits are unrebutted by the government. The government relies on plaintiffs' allegations in their original complaint, but this reliance is misplaced. First, the original complaint contains no allegations concerning disruptive or manipulative use of informants. Second, and more important, ambiguous pleadings drafted by plaintiffs' counsel evidence little if anything concerning what plaintiffs knew, and have no evidentiary value whatsoever compared with plaintiffs' affidavits. Camire v. United States, supra, 535 F.2d at 750.

It follows that Judge Griesa correctly held that he could not finally resolve this issue until after trial.

As to break-ins or burglaries by informants, it is undisputed that plaintiffs had no knowledge and no basis for suspecting their occurrence, prior to the Redfearn arrest in July, 1976. Pet., p. 13a.

Conclusion

For the reasons stated the petition should be denied.

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July 18, 1977

Respectfully Submitted,

LEONARD B. BOUDIN
HERBERT JORDAN
RABINOWITZ, BOUDIN AND STANDARD
30 East 42nd Street
New York, New York 10017
(212) 697-8640
Attorneys for Plaintiffs-Appellees

On the petition:
HERBERT JORDAN